I am fortified in this view by certain *dicta* in the judgment of Scrutton L.J. in *Spero's case* [4], at page 505, where he said:

"It seems clear in section 6 that the Legislature, while requiring a copy of the contract to be signed, has not required a copy of the security to be sent to the borrower, and it may need consideration whether if there is a more onerous term in the security than in the contract, the note of the contract may not be incomplete. I am disposed to think that where the contract contemplates a promissory note as security and there is a promissory note in the ordinary form, not contradicting the contract, the fact that the contract does not set out the terms of the promissory note will not invalidate the contract. It may be otherwise if the security contains an onerous term not in the contract."

Again, in *Marshall's case* [2] at page 696, Clauson L.J. said:

"The Act does not require the terms of a security to be set out in the memorandum, but, if the effect of the security is that a liability different in any respect to that described in the memorandum is, or may be, directly or indirectly imposed on the borrower, this further liability must appear in the memorandum."

For the above reasons, I am of opinion that the note or memorandum in this case sufficiently complied with the provisions of subsection (3) of section 16 of the Ordinance, and the security is enforceable. Accordingly there will be an order as prayed, with costs against the respondent.

Order as prayed.

Solicitors: *Shook Lin & Bok; K. Chelvanayagam.*

CHINNAKARAPPAN v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) March 11, 1962]

[J.B. — Criminal Appeal No. 4 of 1962]

Criminal Law and Procedure — Bail — Whether magistrate had considered relevant factors — Bailable and non-bailable offences — Criminal Justice Ordinance, 1953, ss.2, 5 — Effect of — Bailable or non-bailable — Whether penal servitude under Criminal Justice Ordinance means imprisonment for life as in the Criminal Procedure Code, (Cap. 6), ss.2, 301, 388.

Penal Code, s.326 — Grievous hurt with dangerous weapon.

A magistrate has no power to grant bail in cases punishable with death or life imprisonment, but if the effect of section 2 of the Criminal Justice Ordinance was to permit in proper cases persons to be released on bail in all non-bailable cases other than those punishable with death, then in this case the learned magistrate had considered the matter judicially and exercised his discretion properly.

The words "penal servitude for life" where they appear in the Criminal Procedure Code must be interpreted as meaning "imprisonment for life" in view of section 2 of the Criminal Justice Ordinance. *R.* v. *Chan Choon Weng & Ors.* [2] followed. *Ad'at bin Taib* v. *Public Prosecutor* [1] dissented from.

Cases referred to:—

(1) *Ad'at bin Taib* v. *Public Prosecutor* [1959] M.L.J. 245.

(2) *R.* v. *Chan Choon Weng & Ors.* [1956] M.L.J. 81.

CRIMINAL APPEAL.

Robert Yap for the appellant.

Syed Othman bin Ali (Deputy Public Prosecutor) for the respondent.

Adams J. (delivering oral judgment): This is an appeal against the refusal of the learned magistrate, Johore Bahru, to grant bail to the accused who stands charged with an offence under section 326 of the Penal Code, that is to say voluntarily causing grievous hurt by a dangerous weapon.

In his grounds of decision which I can only describe as admirable, the learned magistrate has quite clearly applied his mind with the greatest care to all the factors that go towards the granting of bail and which are set out with clarity in *Mallal's Criminal Procedure,* 4th Edition, at page 551. The learned magistrate points out that the offence is extremely serious and that the Court Inspector had said that the victim's arm was severed and had to be amputated. The learned magistrate then goes on to say that he considered that there was a possibility that the offence might be repeated if the accused were released on bail and that the witnesses might well be tampered with.

The learned magistrate then goes on to deal with a further application for bail made before him by Mr. Robert Yap of counsel who referred the magistrate to a judgment of Neal J. in *Ad'at bin Taib* v. *Public Prosecutor* [1]. The learned judge says: "In my opinion, the effect of Ordinance No. 14 of 1953 in practice is that the only non-bailable offences are those punishable with death." The learned magistrate was unable with respect to follow that *dictum,* and preferred to follow the decision of Spencer Wilkinson J. in *Reg.* v. *Chan Choon Weng & Ors.* [2].

With respect to the learned judge in *Ad'at's case* I do not agree that the only non-bailable offences since the passing of the Criminal Justice Ordinance, No. 14 of 1953, are those punishable with death.

A "bailable offence" is defined in section 2 of the Criminal Procedure Code as an offence shewn as bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force and "non-bailable offence" means any other offence. The offence of voluntarily causing grievous hurt by dangerous weapons or means under section 326 of the Penal Code is shown in the First Schedule to the Criminal Procedure Code to be non-bailable. I do not see how the Criminal Justice Ordinance, 1953, affects the position at all.

That being the case and therefore bail (subject to what I have to say in a minute as to whether it in fact can be granted in a case of this nature) being discretionary, it is manifestly clear that the learned magistrate has carefully applied his mind to the question of whether or not bail should be granted, he has applied his mind to the problem and has exercised his discretion judicially. In the event he has refused to grant bail on substantial grounds.

As to whether or not bail can be granted in cases of this nature, there is apparent conflict between Spencer Wilkinson J. in *Reg.* v. *Chan Choon Weng & Ors.* and Neal J. in *Ad'at bin*

Taib v. *Public Prosecutor* as to the effect of section 2(1) of the Criminal Justice Ordinance, 1953. That section reads as follows:—

"No person shall be sentenced by a Court to penal servitude; and every law conferring power on a Court to pass a sentence of penal servitude in any case shall be construed as conferring power to pass a sentence of imprisonment for a term not exceeding the maximum term of penal servitude for which a sentence could have been passed in that case immediately before the commencement of this Ordinance."

The judgment of Spencer Wilkinson J. was a considered judgment. The judgment of Neal J. was an oral judgment. *Chan Choon Weng's* case was decided in 1956, three years after the bringing into force of the Criminal Justice Ordinance, 1953, and it is quite clear from the wording that Spencer Wilkinson J. had considered the effect of section 2 of the Criminal Justice Ordinance, 1953, and he had interpreted it as the learned Deputy Public Prosecutor in *Ad'at's* case asked the learned judge to interpret it as meaning that when the words "penal servitude for life" appear in the Criminal Procedure Code they must be interpreted as meaning "imprisonment for life". With that view I respectfully agree and with great respect to Neal J. I find I am unable to accept his argument that this is not so. It is true that the legislature found it specifically necessary to amend section 301 of the Criminal Procedure Code by section 5 of the Criminal Justice Ordinance. But it was specifically necessary to amend section 301 of the Criminal Procedure Code because that section originally read as follows:—

"The Resident of the State in which the offence was committed may, with the consent of the Ruler of that State and without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it—

(a) Death;

(b) Penal servitude;

(c) Rigorous imprisonment for a term not exceeding that to which he might have been sentenced;

(d) Simple imprisonment for a like term;

(e) Fine."

It was clearly neater and in the interest of clarity to amend the section so that it reads as it does at present:

"The Ruler of the State acting in accordance with the provisions of Article 42 of the Constitution in which the offence was committed may, without the consent of the person sentenced, commute any one of the following sentence for any other mentioned after it—

(a) Death;

(b) Imprisonment;

(c) Fine."

But it was also necessary to do so because section 2 of the Criminal Justice Ordinance specifically refers to the conferring of a power on the court, whereas section 301 of the Criminal Procedure Code conferred the power on the Ruler. Section 301 therefore had to be amended, but this does not mean that "Penal Servitude" in section 388(1) should not be read in effect as "imprisonment for life". The relevant wording of section 388(1) reads: ". . . . . shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with . . . . . penal servitude for life". But this punishment is a power conferred upon the court to award, and therefore must be construed to be, in my view, after the passing of the Criminal Justice Ordinance, 1953, as "imprisonment for life".

In my view, therefore, following Spencer Wilkinson J., I do not consider that there is any power for the magistrate to grant bail in cases punishable with death or imprisonment for life. Therefore, the learned magistrate was unable and had no power to grant bail in this present case. But even if I am wrong and the effect of section 2 of the Criminal Justice Ordinance, 1953, is to permit in proper cases persons to be released on bail in all non-bailable cases other than those punishable with death, then I would hold that the learned magistrate has considered the matter judicially, exercised his discretion judicially and has come to a decision which I consider is a proper one. It has long been established that once the magistrate has properly exercised his discretion it is not for an appellate Court to interfere with it.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Battenberg & Talma.*

IBRAHIM v. PUBLIC PROSECUTOR

[A. Cr. J. (Hashim J.) March 19, 1962]

[Kuantan — Criminal Appeal No. 1 of 1962]

Evidence — Onus on prosecution to prove its case — When defence to be called — Criminal Procedure Code (Cap. 6), s.173(f).

The defence should not be called where the prosecution has failed to prove its case. Under no circumstances should a Magistrate call for the defence merely to clear any doubt he may have in his mind as to whether the prosecution had or had not proved its case.

CRIMINAL APPEAL.

V. C. George for the appellant.

Sheikh Abdul Rahman bin Abu Bakar (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Hashim J.: The appellant was charged for driving a motor lorry without due care and attention. He was found guilty, convicted and sentenced to a fine of $100 in default 2 months' imprisonment. His driving licence was ordered to be endorsed. At the hearing of the appeal the learned Deputy Public Prosecutor stated that he did not support the conviction.

There was no eye-witness to the accident. The prosecution relied on the evidence of a 13-year old youth who stated that he saw a man cross the road and then saw the man lying on the road. The man died in hospital the same day.

The learned magistrate thought fit to call for the defence though, in my opinion, the prosecution had failed to prove its case. There appears